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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 538.

GLENN L. MARTIN COMPANY,
Petitioner,

v.

NORTHWEST AIRLINES, INC.,
THE BRITISH AVIATION INSURANCE COMPANY, LTD.,
THE INSTITUTE OF LONDON UNDERWRITERS,
R. WALKER ROYLANCE and A. J. WHITTALL
(For the Subscribing Underwriting
Members of Lloyd's, London),
FIDELITY & CASUALTY COMPANY OF NEW YORK,
Respondents.

PETITIONER'S REPLY BRIEF
In Support of
PETITION FOR WRIT OF CERTIORARI
To United States Court of Appeals
For Sixth Circuit.

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PETITIONER'S REPLY BRIEF
In Support of Certiorari.

Respondents' argument resisting review is not well taken.

I. RESPONDENTS ARE WRONG IN THINKING PETITION NOT TIMELY.

Respondents' argument (p. 2) that the petition for writ of certiorari was filed too late rests upon mistake.

The petition was filed November 25, 1955. This was the 88th day following denial of rehearing on August 29, 1955.

Respondents miscalculate the days elapsed when they say (Brief, p. 2):

"The petition for certiorari is dated November 23, 1955, and was filed November 25, 1955, both of which dates are more than the ninety days after August 29, 1955, allowed by 28 U. S. C. A., Sec. 2101(c)."

It is 88 days from August 29, 1955, to November 25, 1955. The petition, therefore, was filed within the 90 days allowed by 28 U. S. C. § 2101(c).

Since the petition is timely, counting from the denial of rehearing on August 29, 1955, it is unnecessary to consider whether the time for applying for certiorari was tolled pending ruling on the motion to vacate, which did not issue until October 3, 1955.

II. WRIT SHOULD ISSUE.

In light of the argument made by Northwest, three points should be noted:

1. Court Below Established Dangerously Lax Standards of Care for Airlines.

Northwest would excuse its failure to see what its own witness Dr. Tuckerman said was open and obvious—and which here raises the controlling issue of law—by confining responsibility to "one young airline engineer." (Respondents' Brief, pp. 4, 5.)

This will not do.

An airline cannot be exonerated, as a matter of law, on the ground only "one" engineer inspected; nor can it plead as a defense that the engineer was "young." When the standard of care demanded of commercial airlines is in question the law does not look to numbers or to age.

Besides, the argument disregards the three other persons who examined the part and saw it installed. At

least four Northwest engineers examined the part. (331a-335a, 559b.) They are:

K. R. Ferguson, a graduate engineer. He had studied aeronautical engineering at M. I. T. and had been with Northwest since 1930. At the time in question he was Northwest's Vice President in Charge of Engineering and Planning. (35a, 36a.)

H. L. Prieve, an aeronautical engineer holding a degree in that field from the University of Minnesota, granted in 1934. (555b, 791a.) He was Northwest's structural engineer dealing with air frames—the very subject under inquiry. (791a-792a, 548b, 556b.) He was in continuous residence at the Martin plant for two years while these planes were being built. (699b, 559b.)

Felix Perry, a graduate aeronautical engineer. (111b.) He joined Northwest in 1942. He was Aircraft Project Engineer for Northwest; his work concerned aircraft structures. (265a, 108b, 109b.)

D. O. Benson, Superintendent of Aircraft Engineering for Northwest. (110b.) He "generally reviewed the entire design and conferred on changes that he wanted made." (333a.)

In short, as the Court of Appeals conceded, Northwest followed "the day-by-day manufacture" (Appendix to Petition, p. 32); "Northwest's representatives did insist upon changes" (Appendix, p. 34); they "had been expressly instructed by Northwest to insist upon any changes they thought would increase the safety of the airplanes" (Appendix, p. 34); Northwest's representatives "actually did observe" the part in question (Appendix, p. 34).

To rule, therefore, as did the Court below, that an airline is exonerated as a matter of law, is to establish a dangerously lax standard of care for commercial air lines.

2. Lack of Objection Required by Federal Rule 51 Bars Reversal.

Northwest argues (pp. 11-15) that it made its position clear to the trial court.

There is no question about this.

The petition concedes (p. 19) "Northwest made known its position with respect to charges requested of the court."

There was thus compliance with Rule 46 of the Federal Rules of Civil Procedure.

But that does not answer the further question whether there was compliance with Rule 51 which says:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Whether compliance with Rule 46 alone is enough or whether there also must be compliance with Rule 51 is the question. That is the question this case raises. That question is involved in *Victor D. Gibson v. Lockheed Aircraft Service, Inc.*, wherein this Court granted certiorari. 349 U. S. 943.

3. Court Should Require Compliance With en banc Rule of Western Pacific Case.

The Court of Appeals was not obligated to consider this case *en banc*.

But it most surely was obligated to follow the procedure prescribed by this Court in *Western Pacific Rail-*

road Corp. v. Western Pacific Railroad Co. (1953), 345 U. S. 247.

With that procedure the Sixth Circuit has not complied.

It should be required to do so.

CONCLUSION.

The writ should issue.

Respectfully submitted,

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